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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Nour Eddine Elasali, Plaintiff, vs. Sun Diego, Rich Illes, Scott Mcloud, John Swets, Lori Ortiz, Lorenzo Ortiz, DOES 1 - 100, Defendants.	**CASE NO: C 07 cv02272 W (JMA)** **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS.** Date: June 30, 2008 Judge: Hon. Thomas J. Whelan Dept: 7 [NO ORAL ARGUMENT PER LOCAL RULE]

Defendants SURERIDE CHARTER, INC. dba SUN DIEGO CHARTER CO. (erroneously sued as "Sun Diego"), RICH ILLES, and SCOTT MCLEOD (erroneously sued as "Scott Mcloud") (hereinafter collectively referred to as "Defendants") hereby provide the following Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss.

I. INTRODUCTION

Although Plaintiff filed an Opposition, some facts remain undisputed. Specifically, the facts that remain undisputed are as follows:

- Complete diversity does not exist. Plaintiff is a citizen of California, and each of the Defendants in this case is also a citizen of California.
- A parallel action currently exists in State Court regarding the same claims.

II. ARGUMENT

A. THE MOTION WAS FILED TIMELY.

Plaintiff's Opposition alleges that the instant Motion is untimely. However, said allegation is not accurate, and should not be considered in the ruling on this Motion.

1. Defendants Filed The Motion By The Date Required.

The Motion filed by Defendants was timely. Specifically, Defendant Illes was served with Plaintiff's Federal Complaint on May 14, 2008. As such, a pleading (i.e. an Answer, Motion to Dismiss, etc.) had to be filed within twenty (20) days after the service of summons, which time period was set forth within the document entitled "Summons on Amended Complaint in Civil Action" (which should be on file with the Court. If not, please see a courtesy copy attached as Exhibit 1.) Consequently, twenty (20) days after May 14, 2008, is June 3, 2008. Plaintiff's Opposition states that the envelope he received that contained Defendants' Motion was stamped on June 3, 2008. (Please see Plaintiff's Opposition, 1: 26 - 27, as well as Plaintiff's Declaration ¶ 1.)

Furthermore, on May 29, 2008, at about 1:30 p.m., Attorney Bloom spoke to a gentleman from the Court regarding the calendaring of said Motion. At this time, the calendar clerk informed Attorney Bloom that a "hearing date" of June 30, 2008 would be scheduled, although no oral argument would be heard per the local rule. Additionally, Attorney Bloom was informed by the calendar clerk that the Motion to Dismiss had to be filed by June 3, 2008. (Please see Declaration of Davina Bloom ¶ 2.) Lastly, pursuant to Local Civil Rule 7.1(e)(7), "the clerk's office is directed not to file untimely motions and responses thereto without the consent of the judicial officer assigned to the case." Consequently, if Defendants' Motion was untimely, the Court would not have filed said Motion on the date that Defendants submitted it for filing, which was June 3, 2008.

2. Plaintiff Does Not Claim Any Prejudice.

Although Plaintiff alleges that the Motion was not timely filed, Plaintiff does not allege any prejudice as a result. The only statement that could be construed as one of Plaintiff's complaints is the fact that his P.O. Box address, which is the only manner that Defendants had to serve Plaintiff, added more delay. However, as is more fully set forth below, this is no fault of Defendants. As such, since no prejudice exists, any alleged "untimeliness" of the Motion is of no consequence.

3. Defendants Sent The Documents To The Address Provided By Plaintiff.

Plaintiff's Opposition argues that sending the moving papers added more delay. However, as set forth within the moving papers, in the Declaration of Attorney Bloom, Attorney Bloom spoke to Plaintiff regarding the manner in which he was to be served with documents. Plaintiff informed Attorney Bloom (as well as Attorney Bloom's assistant) that he only had a P.O. Box address, and that he did not have an e-mail or facsimile number that can be used for the service of documents. Specifically, he stated to use his P.O. Box for the service of documents. (Please see Declaration of Davina Bloom ¶ 11, which was filed with the moving papers.) Additionally, this is the only method that Plaintiff provides in the Court documents to have him be served. Thus, Defendants cannot be faulted for sending the documents via the only method that Plaintiff provided to Defendant.

B. CONTRARY TO PLAINTIFF'S CONTENTIONS IN HIS OPPOSITION, THIS MOTION SHOULD BE GRANTED.

Plaintiff's Opposition contends that even if Plaintiff "neglected" to include jurisdictional allegations (or alleged jurisdictional grounds incorrectly), the Motion should be denied. However, the law Plaintiff cites in support of his contention is distinguishable. Moreover, aside from the law cited in the Opposition, Plaintiff does not deny having a parallel action in State Court. Aside from this, Plaintiff essentially is stating he will concoct claims - i.e. "I will not sue for same claim....I will sue for different claims..." (Please see Plaintiff's Opposition, 4: 9 - 13.) Obviously, specificity is necessary as to what new claims will be raised. Defendants' Motion to Dismiss should be granted for all reasons set forth within the moving papers, as well as these Reply papers. Plaintiff has created a huge injustice (due to the time, money, effort, and burden) to Defendants in filing two separate actions regarding the same claims.

1. The Case Law Provided By Plaintiff Is Distinguishable.

Although Plaintiff provides case law to support his contentions set forth within his Opposition, all the cases cited are distinguishable. The cases cited should not be considered in the case at hand, as they are inapplicable.

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a. Regardless Of The Amount In Controversy Plead, Complete Diversity Still Does Not Exist.

The Cook v. Winfrey (7th Circuit 1998) 141 F.3d 322 case that Plaintiff cited is distinguishable. First and foremost, that action commenced on January 16, 1997 when the $50,000.00 jurisdictional minimum was still the law, which eleven years ago changed to $75,000.00 on January 17, 1997. Furthermore, the case states "...any technical defect in reciting the $50,000.00 minimum in the allegation of jurisdiction was overcome by the clear allegations elsewhere in the complaint that the case involved a sum well in excess of the $75,000.00 minimum. Cook v. Winfrey (7th Circuit 1998) 141 F.3d 322, 326.

However, nowhere within Plaintiff Elasali's Complaint does it mention any amount of money, aside from his initial allegations that the Complaint exceeds "$50,000.00". There are no clear allegations in Plaintiff Elasali's Complaint that the case involves a sum over $75,000.00, which is what is only one of the two-part test needed to establish subject matter jurisdiction. The second part of the test (as fully set forth within the moving papers to this Motion) is that not one Plaintiff and not one Defendant can be a citizen of the same state. This part of the test clearly cannot be met, via Plaintiff's own admissions (as fully set forth within the moving papers to this Motion.) Consequently, the Winfrey case is inapplicable to the case at hand, and should not be considered.

b. Allowing Discovery Will Not Change The Fact Complete Diversity Does Not Exist, And Will Not Change That Plaintiff Has a Parallel State Action.

The Majd-Pour v. Georgiana Community Hospital, Inc. (11th Circuit 1984) 724 F.2d 901 case is also distinguishable. First and foremost, the case is regarding a Temporary Restraining Order, which would be wholly inapplicable to this alleged Employment claim. In addition, although Plaintiff provides this citation, Plaintiff does not even state that he would be able to show the existence of jurisdiction if discovery is allowed. The reason being is that it is apparent that complete diversity does not exist.

Moreover, although Plaintiff claims that not affording him the opportunity to conduct discovery would be an abuse of discretion, Plaintiff fails to point out that this case state such opportunity does not mean to suggest that the district court may not, on a proper record and proper showing, deal with jurisdictional question by way of a motion procedure. Majd-Pour v. Georgiana Community Hospital, Inc. (11th Circuit 1984) 724 F.2d 901, 903. Consequently, the Court should grant Defendants' Motion to Dismiss, as discovery would not change the fact that complete diversity does not exist.

The Laub v. United States Department of Interior (9th Circuit 2003) 342 F.3d 1080 case is also highly distinguishable. This case involves governmental agencies, and these agencies challenging Plaintiff's standing. Despite this difference, Plaintiff Elasali fails to point out that although a district court is vested with broad discretion to permit discovery, it is also vested with the same broad discretion to deny discovery. In addition, the case states that "...to deny discovery will not be disturbed except upon the clearest showing that the denial of discovery results in actual and substantial prejudice to the complaining litigant." Laub v. United States Department of Interior (9th Circuit 2003) 342 F.3d 1080, 1093.

The National Resources Defense Council v. Pena (DC Circuit 1998) 147 F.3d 1012 case is similar to the cases previously cited by Plaintiff; and is also distinguishable. The Pena case deals with standing, as it relates to an injunction. One of the issues in the Pena case is whether discovery would support threatened injuries that would establish standing. This case is clearly not applicable to the instat case.

In short, allowing discovery will not effect whether the Court has jurisdiction in the instant litigation. Meaning, discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction. Specifically, discovery will **not** change the fact that the Plaintiff and Defendants are both citizens of California, which means that complete diversity does not exist in this case (i.e. there is no subject matter jurisdiction.) Additionally, discovery will **not** change the fact that Plaintiff already has a parallel action in State Court. Allowing Plaintiff to conduct discovery, which would not effect the facts just stated, and would merely be a waste of time.

2. Plaintiff Admits Having A Parallel Action In State Court.

Defendants filed the instant Motion on the basis that: (1) complete diversity does not exist; (2) the amount in controversy does not exceed $75,000.00; and (3) Plaintiff already has a parallel action filed in State Court. Since Plaintiff already has an action pending in State Court regarding the same factual issues, the resources of two Court should not be expended; and potentially conflicting rulings on legal issues based upon the same facts should not occur.

Plaintiff essentially admitted in his Opposition that he is "forum shopping." As specifically set forth in the moving papers, "forum shopping" should not be tolerated. Specifically, Plaintiff stated "I filed in state and federal court to meet statute of limitations and as a matter of right and to preserve and protect my rights until I get an attorney." (Plaintiff's Opposition, 4: 3 - 7.) Shortly thereafter, Plaintiff stated "Also state may sustain demurrer and close my case and I have the right to sue in one court." (Plaintiff's Opposition, 4: 14 - 16.) These two statements in and of itself prove that Plaintiff is "forum shopping."

In short, Plaintiff also already sued in two courts, and now that Plaintiff believes that the State Court may sustain Defendants' Demurrer, Plaintiff now wants the current Federal Court to hear his case on the merits too, which could obviously lead to conflicting rulings. It is apparent that Plaintiff is "forum shopping", and this should not be tolerated. Consequently, the Court should grant Defendant's Motion, and dismiss the instant action.

3. Some Of Plaintiff's Contentions Are Inaccurate; And More Importantly, Are Irrelevant.

Defendants deny all allegations in Plaintiff's Opposition wherein he stated that Defendants "lied", especially as it relates to Attorney Bloom lying in her declaration, "diliatory tactics", and information regarding past employees of Sureride Charter, Inc. Defendants refer the Court to the Declaration of Davina Bloom filed in support of the moving papers. Aside from what was stated within said declaration, Defendants contend that this information is irrelevant to the instant Motion. Meaning, Plaintiff's allegations have no bearing on the fact that (1) complete diversity does not exist; (2) the amount in controversy does not exceed $75,000.00; and (3) Plaintiff already has a parallel action filed in State Court. (Declaration of Davina Bloom ¶ 5.)

C. PLAINTIFF'S REQUEST FOR SANCTIONS IS UNSUPPORTED, AND SHOULD BE DENIED ON THAT BASIS ALONE.

Plaintiff's Opposition seeks terminating sanctions, and sanctions against all attorneys involved and their law firm. (Please see Plaintiff's Opposition, 4: 16 to 5: 23.) However, Plaintiff's request is completely unsupported, and must be denied on that basis alone. Specifically, Plaintiff's request for sanctions must be denied for the following reasons: (1) Plaintiff provides no legal basis for the allowance of said terminating sanctions, or sanctions against Defendant's attorneys. This reason alone requires denial of Plaintiff's request; (2) Plaintiff provides no justifiable or reasonable factual basis for the granting of terminating sanctions or sanctions; (3) Plaintiff does not state specifically what type of terminating sanction he is requesting, or what type of sanction he is seeking against Defendant's attorneys; (4) Plaintiff's request for sanctions, as set forth within his Opposition, is not supported by any verified, personal knowledge; (5) Defendants deny all of Plaintiff's statements regarding his request for sanctions, as was already explained in the Declaration of Attorney Bloom, which was filed in the moving papers. However, for further clarification and denial, please see Declaration of Davina Bloom ¶ 3 filed with this Reply. Based on the foregoing, Defendant requests that the Court deny Plaintiff's unsupported request for terminating sanctions and sanctions.

III. CONCLUSION

Based on the foregoing, and based on what is set forth within the moving papers, the Court should grant Defendants' Motion to Dismiss.

Respectfully Submitted,

THE WATKINS FIRM, APC

Dated: June 23, 2008

MARK S. BAGULA, ESQ.
DAVINA A. B. BLOOM, ESQ.
Attorneys for Defendants SURERIDE CHARTER, INC. dba SUN DIEGO CHARTER CO. (erroneously sued as "Sun Diego"), RICH ILLES, and SCOTT MCLEOD (erroneously sued as "Scott McLoud")

EXHIBIT 1

AO 440 (Rev 5/85) Summons in a Civil Action

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Nour Eddine Elasali

vs

Sun Diego, Rich Illes, Scott Mcloud, John Swets, Lori Ortiz, Lorenzo Ortiz, DOES 1-100

SUMMONS ON AMENDED COMPLAINT IN CIVIL ACTION

Case No. 07cv02272 W (JMA)

TO: (Name and Address of Defendant)

Rich Illes
2020 Hoover Av
National city, CA. 91950

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon PLAINTIFF'S ATTORNEY

Nour Eddine Elasali
PO Box 84764
San Diego, CA 92138

An answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

W. Samuel Hamrick, Jr.
Clerk of Court

January 18, 2008
DATE

A. Everill

By, A. Everill, Deputy Clerk

Case 3:07-cv-02272-W-JMA Document 5 Filed 01/11/2008 Page 1 of 2

Nour Eddine ELASALi
Po Box 84764
SD CA 92138
619 414 8723

FILED
2008 JAN 11 PM 4:13
CLERK US DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA
BY [signature] DEPUTY

United States District Court
Southern District of California

Nour Eddine ELASALi v. San Diego, Rich Illes, Scott Melond, John Swets, Lorenzo and Lori Ortiz, Does 1-100	Case No. '07 CV 2272 W JMA First Amended Complaint for Employment Discrimination, Harrassment Wrongful termination, interference with civil rights (Demand for Jury trial)

Plaintiff Nour Eddine ELASALi alleges:

1. Plaintiff is and was at all times mentioned herein a citizen of the state of California.

2. Jurisdictional allegations: San Diego is a corporation incorporated under the laws of California having its principle place of business in California. The jurisdiction of this court over this matter is predicated on 28 USC $1332. The amount in controversy exceeds $ 50,000.00, exclusive of interest and costs.

3. Venue allegations: All defendants reside

cc

in this district and also the claim arose in this district.

4. Charging allegations: Plaintiff alleges while working at Sun Diego charters Co. Scott Mcloud and John Swets constantly harrassed me and discriminated against me by insulting me, calling me names and making hate remarks about my religious belief and national origin. They also continiously interfered with my job. I asked them several times to stop it and they refused. So I reported them to Rich Illes the owner of the company three different times which led to my wrongful termination. Lorenzo and his wife Lori Ortiz has also interfered with my civil rights by covering up for them in illegal ways and encouraging them to continue their illegal acts. These illegal acts has caused me severe emotional distress. Wherefore Plaintiff prays for judgment against all defendent's to include Punitive damages, compensatory damages, assignment back to previous job, any and all damages, rights that the Court may find proper. Damages exceeds $50,000.00 and has not been asertained yet

Plaintiff herby demands a jury trial as provided by rule 38(a) of the federal rules of civil procedure.

Plaintiff also request that court allow my attorney to correct/adjust the complaint if needed.

Date: 01-11-08

Noureddine ELASALI
[signature]
Plaintiff, Pro se.